UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re: ON-LINE TRAVEL COMPANY (OTC) HOTEL BOOKING ANTITRUST LITIGATION	C.A. No. 3:12-cv-3515-B

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO STAY ARBITRATION BRIEFING PENDING SUPREME COURT DECISION AND MOTION TO ALLOW FOR DISCOVERY REGARDING ARBITRATION AND TO EXTEND TIME FOR PLAINTIFFS TO RESPOND TO MOTION TO COMPEL ARBITRATION

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I. INTRODUCTION

Travelocity.com, LP and Sabre Holdings Corporation ("Travelocity") try to foist a "gotcha" on both Plaintiffs and the Court. The Court received hundreds of pages of submissions by multiple plaintiff groups and defendants and held a February 25, 2013 status conference hearing, all of which primarily concerned the propriety of consolidation and early merits discovery, appointing lead and liaison counsel for Plaintiffs, and scheduling the consolidated complaint and ensuing motion to dismiss. The Court then entered orders addressing these matters, staying all discovery and setting the arbitration briefing schedule. Travelocity portrays these rulings as reflecting the Court's purposeful decisions to (i) forego imminent Supreme Court guidance on perhaps the central issue of Travelocity's arbitration motion and (ii) forbid arbitration-related discovery. Plaintiffs disagree. The better explanation is that these issues were simply passed over in the process of addressing the myriad case-wide issues discussed at the February 25, 2013 hearing and later resolved by the Court. The Court hence should modify the discovery stay and find that "good cause" exists under Rule 16(b)(4) to modify the Initial Scheduling Order.

II. ARGUMENT

A. The Supreme Court's Imminent *American Express* Decision Is Good Reason to Stay Travelocity's Motion to Compel Arbitration.

Plaintiffs urge the Court to stay Travelocity's arbitration motion in light of *American Express Co. v. Italian Colors Restaurant*, No. 12-133 ("*Amex*"), which is pending now before the Supreme Court. Motion (Dkt. Entry 73) at 1-2. Plaintiffs explain that the question before the Court in *Amex* is also fundamental to Travelocity's motion, and ask the Court to stay all briefing for the motion "to preserve the parties' and its own resources …." *Id*. at 3-4.

Travelocity does not deny that *Amex* will likely resolve issues central to its motion and could be dispositive. Instead, citing a lone 20-year-old decision from outside the Fifth Circuit, Travelocity insists that, irrespective of the *Amex* ruling's potentially dispositive nature, a stay is improper because, if district courts blithely stayed motions merely because the Supreme Court was addressing a pertinent issue, "the federal court could not function …." Opp. at 5.

Nonsense. District courts regularly stay motions when a pertinent issue is pending before the Supreme Court. The Supreme Court has long recognized that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."[1] In light of that discretion, courts hold that "a court may hold one lawsuit in abeyance to abide the outcome of another which may substantially affect it or be dispositive of the issues."[2] A stay is particularly compelling where the other matter has already been argued and a decision will likely be handed down in a few months.[3] A motion to stay "may be justified when a similar action is pending in another court …. In these situations the court's objectives are to avoid conflicting judicial opinions and to promote judicial efficiency."[4] The Fifth Circuit thus noted in *Catogas v. Cyberonics*, that "the district court denied plaintiffs' motion and stayed the action, pending the Supreme Court's disposition of *Tellabs*."[5] It likewise stayed an appeal pending a Supreme Court decision on a related issue.[6] District courts within this Circuit thus routinely stay matters pending a decision from a higher court in a different case.[7] The purpose typically is to avoid conflicting judicial opinions and accruing unnecessary attorney's fees.[8]

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[1] *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936).

[2] *Bechtel Corp. v. Local 215 Laborers' Int'l Union of N. Am.*, 544 F.2d 1207, 1215 (3d Cir. 1976).

[3] *See, e.g., Marshel v. AFW Fabric Corp.*, 552 F.2d 471, 472 (2d Cir. 1977) (ordering district court to stay case pending resolution of case in Supreme Court in which Supreme Court argument had already taken place because Supreme Court's decision would likely decide question of defendant's liability for damages).

[4] Charles Alan Wright & Arthur R. Miller, 5C FEDERAL PRACTICE & PROCEDURE CIV. § 1360 (3d ed. 2010).

[5] *Catogas v. Cyberonics*, 292 Fed. Appx. 311, 312 (5th Cir. Tex. 2008). *See also De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1389 (5th Cir. 1985) ("[t]he district court stayed the proceedings pending a decision by the Supreme Court in *Verlinden*").

[6] *Western Seafood Co. v. United States*, 202 Fed. Appx. 670, 673 (5th Cir. Tex. 2006).

Here, a stay is warranted because the Supreme Court's decision in *Amex* "may substantially affect" or "be dispositive of the issues" in Travelocity's motion. *Amex* will likely address whether the FAA allows courts to invalidate arbitration agreements that do not permit class arbitration of a federal-law claim. Plaintiffs' opposition to Travelocity's motion will place this issue squarely before this Court. *Amex* will likely either affirm or reject the argument. Either way, staying Travelocity's motion until the Supreme Court decides *Amex* during its present term will preserve the Court and parties' resources, at minimal delay to Travelocity's motion.

Ignoring the scores of opposing, well-reasoned decisions, Travelocity relies solely on *Kopystecki v. Quality Books, Inc.*,[9] an outlier ruling from outside the Fifth Circuit that no court (either federal or state) has ever chosen to cite. Moreover, the question at issue in *Kopystecki* concerned only the availability of certain damages. The court concluded that a controlling appellate decision would issue before trial, allowing the court time to revise its ruling as needed. *Id.* at *7. But a rushed ruling's impact here could be far more consequential by directing this litigation to a venue that the forthcoming *Amex* decision could then prove inappropriate, potentially causing a substantial waste of resources.[10]

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[7] *See Mabary v. Hometown Bank, N.A.*, 2013 U.S. Dist. LEXIS 36704, at *3 (S.D. Tex. Mar. 18, 2013) ("Defendant asked that the case be stayed pending a Supreme Court decision on a related case, *First Am. Fin. Corp. v. Edwards*, 132 S. Ct. 2536, 183 L. Ed. 2d 611 (2012). This Court granted the stay".); *Morrow v. Washington*, 277 F.R.D. 172, 177 (E.D. Tex. 2011) ("[b]ecause the Supreme Court's ruling weighed so heavily on the issue of class certification in this case, the court stayed its ruling on the motion for class certification pending the Supreme Court's ruling in *Wal-Mart*"); *Garcia v. Sanchez*, 793 F. Supp. 2d 866, 872 (W.D. Tex. 2011) ("this Court granted plaintiff's request for a stay pending the Supreme Court's decision in *Skinner v. Switzer*"); *Dews v. Town of Sunnyvale*, 2001 U.S. Dist. LEXIS 13086, at *3 (N.D. Tex. Aug. 24, 2001); *Smith v. Hoover Co.*, 2001 U.S. Dist. LEXIS 6142, at *1 (W.D. Tex. Apr. 12, 2001); *Gray v. Doty*, 1998 U.S. Dist. LEXIS 11371, at *2 (N.D. Tex. July 17, 1998).

[8] *See Ioina v. Brinker Int'l Payroll, Co., L.P.*, 2010 U.S. Dist. LEXIS 81978, at *2 (S.D. Tex. Aug. 12, 2010).

[9] *Kopystecki v. Quality Books, Inc.*, 1993 U.S. Dist. LEXIS 3194 (N.D. Ill. Mar. 11, 1993).

[10] Unlike Travelocity's attempt at tea-leaf reading (*see* Opp. at 6 & n.2), Plaintiffs do not try to predict the Supreme Court's decision.

B. Plaintiffs Timely Invoke *Amex* and Arbitration-Related Discovery as Grounds to Stay Travelocity's Motion Because the February 25 Scheduling Hearing Addressed Only Case-Wide Issues and Predated Appointment of Lead Counsel.

Travelocity argues that the arbitration-briefing deadlines set in the Initial Scheduling Order prevent the Court from staying further arbitration briefing. Travelocity further argues that the Order staying discovery prevents the Court from now granting Plaintiffs the right to take limited, targeted discovery regarding arbitration. It bases its argument on Fed. R. Civ. P. 16(b)(4), which states that "a schedule may be modified only for good cause," and several cases applying Rule 16(b)(4) where a party seeking leave to amend a pleading *after* the scheduling order's deadline for amended pleadings expired.[11]

The criteria in those cases for finding "good cause" do not, however, apply where a party seeks to amend a scheduling-order deadline *before* that deadline expires. In such cases, like this one, the Fifth Circuit has held merely that "Rule 16(b)(4)'s 'good cause' standard requires the movant 'to show that the deadlines cannot reasonably be met despite the diligence of the party needing the extension.'"[12] In this case, quite obviously, Plaintiffs cannot file a response to the motion to compel arbitration within 21 days as required by the Local Rules if the Court either (i) stays the case pending the Supreme Court's decision in *American Express* and/or (ii) grants Plaintiffs the right to take the limited, targeted discovery that they seek. So if the Court grants the other relief sought by Plaintiffs, there will be "good cause" to extend the deadline for Plaintiffs to respond to the motion to compel arbitration.

Travelocity argues somewhat inconsistently that this Court recognized either the

[11] *See Cole v. Sandel Med. Indus., L.L.C.*, 413 Fed. Appx. 683, 689 (5th Cir. 2011); *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 863-64 (5th Cir. 2003); *S&W Enters., L.L.C. v. Southtrust Bank of Ala., N.A.*, 315 F.3d 533, 535-36 (5th Cir. 2003); *Lincoln Gen. Ins. Co. v. U.S. Auto Ins. Serv., Inc.*, 2009 U.S. Dist. LEXIS 36426, at *2-5 (N.D. Tex. Apr. 28, 2009).

[12] *Puig v. Citibank, N.A.*, 2013 U.S. App. LEXIS 3767, at *12-13 (5th Cir. Feb. 22, 2013) (discussing motion to extend discovery deadline filed before deadline had expired) (quoting *S&W Enterprises, LLC*, 315 F.3d at 535).

existence of the issue of whether it should stay arbitration briefing pending the Supreme Court's decision in *Amex* and decided not to stay it *or* that Plaintiffs did not bring the issue sufficiently to the Court's attention and they therefore waived it. The Court should reject both arguments.

It does not appear the Court purposefully declined to stay arbitration briefing pending the Supreme Court's *Amex* decision. The February 26 hearing only addressed issues pertaining to the entire consolidated case. There were many issues and parties before the Court at the hearing, which was the Court's first all-hands conference after the JPML transferred the several separate actions to this Court for consolidated treatment. Travelocity was just one of 12 defendants that appeared, and its prospective arbitration motion received sparse attention at the hearing. Rather, the Court and parties focused on the propriety of consolidating cases, selecting lead counsel, and scheduling merits discovery, the consolidated complaint and the inevitable dismissal motion. *E.g.*, Transcript at 21:20 – 28:7; 54:21 – 57:14. With multiple issues before the Court pertaining to the entire consolidated action, there was no argument about Travelocity's unique arbitration motion or issues relating to its scheduling or arbitration-related discovery.[13] One plaintiff's counsel briefly mentioned the *Amex* case (although not by name), *id*. at 40:3-7, but his argument also centered on counsel selection, merits discovery and scheduling the filings of a consolidated complaint and motion to dismiss, *id*. at 40:7 – 44:6. Other plaintiffs' counsel also focused on those issues. *E.g.*, *id*. at 48:15 – 50:25.

Nor did defense counsels' argument about briefing schedules address the motion to compel arbitration. *Id*. at 60:3-15. Their arguments about discovery similarly concerned only merits discovery. *Id*. at 62:1 – 67:16; 67:25 – 69:22; 70:17 – 71:14; 74:2 – 75:14. To the extent Travelocity's counsel mentioned arbitration, it was merely to emphasize that Travelocity was not

[13] There was one brief reference, but no argument. *See id*. at 26:21-24.

waiving any rights and that Travelocity did not want its arbitration motion to impede the overall litigation. *Id*. at 72:11 – 73:8.

The Court's comments at the end of the hearing seemed to confirm its concentration on selecting lead counsel and scheduling merits discovery, the consolidated complaint and ensuing dismissal motion. *Id*. at 75:22 – 76:5; 77:15 – 78:20. The Court concluded: "Those are the primary issues that I wanted to get resolved this morning." *Id*. at 79:4-5.

Travelocity thus distorts the record to insist Plaintiffs argued and the Court rejected that it should stay Travelocity's arbitration motion until after the *Amex* ruling and arbitration-related discovery. While Travelocity may now perceive that the hearing revolved around it and its arbitration motion, the hearing actually concerned matters affecting the entire consolidated litigation – which is what Plaintiffs addressed. Given the host of pressing case-wide issues and the large number of counsel assembled for the hearing, it appeared inappropriate to consume the time and attention of the Court and counsel on argument unique to a single defendant. Given the hearing's focus on merits discovery and the dearth of argument about arbitration-related discovery, Plaintiffs raise the issue of arbitration-related discovery for the first time here.

Nor should the Court consider the issue waived. Travelocity's accusation that "Plaintiffs chose to lie in wait" (Opp. at 4) or were otherwise dilatory is fanciful. Travelocity overlooks that the hearing took place before the Court appointed interim lead counsel in the consolidated MDL case. The consolidated case's prosecution, accordingly, was leaderless at the hearing. Travelocity alludes to the consolidated plaintiffs' then-rudderless state, referring in its brief to "[v]arious plaintiffs" who spoke at the hearing. *E.g.*, Opp. at 1. But no plaintiff or counsel could speak for the consolidated case until March 1, when the Court appointed interim lead counsel (Dkt. Entry 47). Lead counsel acted expeditiously in moving to stay on April 8 (Dkt. Entry 73), after

Travelocity filed its arbitration motion.

Further, the Court itself will waste its scarce judicial resources if it proceeds to decide – just before the Supreme Court's *Amex* decision – whether the cost of individually prosecuting antitrust claims would be so high that no Plaintiff would ever do so, making it impossible for Plaintiffs to vindicate their federal statutory rights. Nor would it make sense for the Court to have the parties complete the briefing and withhold its opinion pending the Supreme Court's decision because the Court would then be deprived of the parties' positions regarding the impact of the Supreme Court's decision on this case.

In contrast, Travelocity will suffer no prejudice from staying its motion. The Court has stayed merits discovery and the current schedule does not guarantee that it would rule on arbitration before Travelocity would have to file its dismissal motion. The Court could even exempt Travelocity from filing dismissal motions until after it rules on arbitration.[14]

Accordingly, if the Court believes that awaiting the *Amex* decision and/or allowing arbitration-related discovery is otherwise justified, and it did not specifically consider these factors in entering its scheduling order and discovery stay, the Court should, in the interest of justice, stay Travelocity's motion and allow arbitration-related discovery.

C. Plaintiffs Establish Their Need for Targeted, Limited Arbitration-Related Discovery and for an Extension of Plaintiffs' Deadline to Oppose Travelocity's Motion

1. The Court should allow Plaintiffs discovery into the existence of an enforceable arbitration agreement

Travelocity argues there is no need for discovery on the existence of an enforceable agreement because it provided uncontroverted evidence that an enforceable arbitration agreement

[14] Travelocity's counsel expressed at the hearing a willingness to brief its motion to compel arbitration and its motion to dismiss at the same time. Trans. at 71:21. But it is likely that the motions to dismiss of all of the online travel agencies and also the hotel defendants will be virtually identical. Travelocity can simply join in other defendants' dismissal motions and expend almost no resources while awaiting a decision on arbitration.

exists. Plaintiffs have not controverted the evidence because, of course, they have not taken any discovery to try to do so. Travelocity cites no authority that Plaintiffs must accept without question or discovery its declaration that during a certain time period users of its website were forced to click agreement to terms and conditions that allegedly contained an arbitration agreement. Just as Plaintiffs have a right to conduct discovery into statements made in declarations in a summary-judgment context, they should have the same right in the arbitration context. Otherwise, any defendant willing to falsely claim the existence of an arbitration clause would always be able to prevail on this fundamental prerequisite for compelling arbitration.

Plaintiffs should also receive discovery as to which, if any, Plaintiffs allegedly purchased a room through Travelocity after February 2010, when the arbitration clause allegedly first appeared, and thereby allegedly agreed to arbitration. While Travelocity cites the complaints of two Plaintiffs who alleged they purchased rooms through Travelocity.com after that date, Lead Counsel have the right to choose which of the many plaintiffs who have filed suit will be included in the consolidated amended complaint as class representatives, and it may well be that not a single class representative will have purchased a room from Travelocity after February 2010, making the entire motion to compel moot and/or premature.

Travelocity's reference to *Bell v. Koch Foods of Miss., LLC*[15] overreaches. The Fifth Circuit concluded in an unpublished ruling that the district court did not abuse its discretion by denying discovery specifically because the "arbitration-related discovery would not have helped [appellants] to satisfy their burden of proof." *Id*. at 501. "[T]he requested information was either irrelevant, already within [appellants'] personal knowledge …, or did not support a recognizable claim …." *Id*. The court also declined to adopt a bright-line rule mandating discovery whenever

[15] *Bell v. Koch Foods of Miss., LLC*, 358 Fed. Appx. 498 (5th Cir. 2009).

a party bears the burden of proof to compel or defeat arbitration. *Id*. *Bell* did not, however, find that such discovery was "anathema" to federal arbitration policy.

2. The Court should permit discovery regarding the prohibitive costs of pursuing antitrust claims individually.

Travelocity misconstrues Plaintiffs' argument as if it the requested discovery only concerns the costs that AAA itself would charge to handle an individual antitrust arbitration. The issue is not just about these costs, but also the costs of hiring expert witnesses and other out-of-pocket expenses that Plaintiffs will incur in pursuing this complex antitrust litigation. And, crucially, Travelocity does *not* deny that discovery from them and AAA would show that the total costs of litigating antitrust claims individually would be prohibitively expensive.

Travelocity's argument that the Fifth Circuit disagrees with the Second Circuit on whether the inability to vindicate federal statutory rights can provide a basis for denying arbitration does not, at this time, counsel against Plaintiffs' request for discovery. Rather, it reinforces that the Court should stay arbitration briefing until the Supreme Court has decided *Amex* and that it should delay its ruling on the scope of discovery that Plaintiffs should receive before responding to the motion to compel arbitration until after the *Amex* decision.

3. The Court should allow discovery regarding whether Travelocity's chosen arbitral forum is biased and/or fundamentally unfair to Plaintiffs.

Travelocity responds that the Court should not allow discovery about only hypothetical problems with the fairness of its chosen arbitral forum. But the actual provisions requiring arbitration only before Tarrant County arbitrators, where Travelocity headquarters, and not allowing in-person arbitrations without Travelocity's permission are so unusual that the Court should strongly consider the possibility that they were included precisely because Travelocity believes they provide an unfair advantage. Of course, Plaintiffs have no ability to produce evidence about this issue on their own. They can only obtain it by discovery from Travelocity and AAA. Having included such unusual provisions, Travelocity should be prepared to provide discovery to prove the provisions' fairness.[16]

Perhaps wishing to avoid discovery into these issues for obvious reasons, Travelocity offers to waive these provisions. This is not so easy, however. If the Court finds these provisions unenforceable, federal policy dictates that it not rewrite the arbitration clause by severing these provisions, but rather that it hold the entire arbitration clause unenforceable.[17] The Court should await the Supreme Court's *Amex* decision, allow this discovery and discovery on the other topics requested by Plaintiffs and then, as part of the briefing on the merits, consider whether these provisions make the entire arbitration clause unenforceable.

III. CONCLUSION

For the reasons set forth herein and in Plaintiffs' motion, the Court should to stay arbitration briefing pending the Supreme Court's *Amex* decision, and grant Plaintiffs 90 days to engage in appropriate discovery and file a response.

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[16] *See Walker v. Ryan's Family Steak Houses, Inc.*, 289 F. Supp. 2d 916, 919-28 (M.D. Tenn. 2003) (where defendant chose unusual arbitral forum, the court allowed extensive discovery into the nature of the forum, its potential bias, and its relationship with the defendant and denied enforcement based upon bias of the forum revealed by such discovery), *aff'd*, 400 F.3d 370 (6th Cir. 2005).

[17] *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 512-13 (6th Cir. 2004); *Perez v. Globe Airport Sec. Serv., Inc.*, 253 F.3d 1280, 1287 (11th Cir. 2001), *vacated pursuant to stipulation of dismissal*, 294 F.3d 1275 (11th Cir. 2002).

Dated April 16, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 16, 2013 the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing. Parties may access this filing through the Court's system.

/s/ Steve W. Berman
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